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No.

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In the Supreme Court of the United States

MASSEY ENERGY COMPANY AND
CENTRAL WEST VIRGINIA ENERGY COMPANY,
Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND
MOUNTAIN STATE CARBON, LLC,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Brooke County, West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners in this case entered into a contract to supply respondents with coal. After petitioners invoked the contract's *force majeure* provision to justify failing to supply the required amounts, respondents sued, alleging breach of contract and fraud. The fraud theory was essentially that petitioners promised respondents that they would make every effort to keep respondents from running out of coal when, in fact, they had no intention of doing so. The jury found petitioners liable on both causes of action, awarding $119 million in compensatory damages and $100 million in punitive damages. The trial court upheld the judgment and tacked on $24 million in pre-judgment interest, calculated at the above-market statutory rate of 10%. The following question is presented:

Whether a $100 million punitive award—imposed upon defendants that have been afforded none of the safeguards of the criminal law—is constitutionally permissible merely because the trial court has labeled the defendants' conduct "reprehensible" and the punitive damages do not exceed the compensatory damages.

RULE 14.1(b) STATEMENT

All parties are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Massey Energy Company is a publicly-traded company. It has no parent corporation, and Fidelity Management & Research owns 10% or more of its stock.

Petitioner Central West Virginia Energy Company is an indirect, wholly-owned subsidiary of Massey Energy Company. No other publicly-traded company has any ownership interest in Central West Virginia Energy Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Central West Virginia Energy Company and Massey Energy Company respectfully petition for a writ of certiorari to review the judgment of the Circuit Court of Brooke County, West Virginia, in this case.

OPINIONS BELOW

The trial court's order rejecting defendants' argument that the punitive award in this case is unconstitutionally excessive (App., *infra*, 1a-14a) is unreported.

JURISDICTION

The judgment of the Circuit Court of Brooke County, West Virginia was entered on September 4, 2007. The order of the Supreme Court of West Virginia denying review was entered on May 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case presents a recurring issue that is of great importance to the fair administration of punitive damages. The trial court allowed plaintiffs to reframe a routine claim for breach of a commercial contract as "fraud," and thus to seek punitive damages. The result was "another stereotypical West Virginia tort litigation bonanza" (*Pocahontas Mining Co.* v.

OXY USA, Inc., 503 S.E.2d 258, 266 (W. Va. 1998) (McCuskey, J., dissenting))—a $100 million punitive award on top of $119 million in compensatory damages, plus $24 million in prejudgment interest (calculated at the above-market statutory rate of 10% per annum). The trial court upheld the nine-figure punitive award after dubbing the conduct "reprehensible"—without saying why it was bad enough to warrant such an enormous sanction—and observing that the ratio of punitive to compensatory damages was less than 1:1.

Review is warranted to provide needed guidance as to the proper application of this Court's excessiveness guideposts in cases involving high absolute amounts of punitive damages, but low ratios of punitive to compensatory damages. Too frequently, lower courts rubber-stamp such awards without regard to whether the gravity of the conduct warrants such massive punishment or whether an exaction of that magnitude is justified for deterrence purposes.

The present case is an ideal one in which to address this recurring problem. Although labeled "reprehensible" by the trial court, petitioners' conduct pales in comparison to the truly heinous conduct that ordinarily would be thought necessary to warrant a nine-digit punishment. Moreover, the trial court itself concluded that the compensatory damages alone exceeded the "profit" from petitioners' alleged misconduct. That observation is all the more true when the hefty award of prejudgment interest (which, at 10% per annum, undeniably contains a punitive element) is factored into the analysis. Accordingly, though the ratio of punitive to compensatory damages may be low, the breathtaking absolute amount of punitive damages in this case—which far exceeds

both the maximum fines that can be imposed for *criminal* violations and the civil penalties typically imposed by West Virginia's expert regulatory agencies—is entirely unnecessary to advance the goals of retribution and deterrence. The Court should grant review to make clear to lower courts that in such circumstances, perfunctorily labeling the conduct "reprehensible" and observing that the ratio of punitive to compensatory damages is low is not enough to justify an eight-, nine-, or ten-digit punitive award.

A. Factual Background

Petitioner Massey Energy Company operates coal mines in West Virginia and other states. Tr. 3314. Petitioner Central West Virginia Energy Company ("CWVEC") is an indirectly-held subsidiary of Massey that handles Massey's sales for West Virginia. Tr. 1262.[1] Respondent Wheeling Pittsburgh Steel Company ("Wheeling Pitt"), the plaintiff in this action, is a major steel producer, with over $1 billion in annual revenue. Tr. 913. Through a joint venture called Mountain State Carbon, Wheeling Pitt operates a coking plant[2] in Follansbee, West Virginia. Tr. 935. Coking plants consume large amounts of coal. Tr. 936.

In 1993, Massey and Wheeling Pitt entered into a 10-year coal supply contract (later extended to 2010), under which Wheeling Pitt agreed to buy all of its "high volatile coking coal" from Massey, at a base price of $41.41 per ton, with annual adjustments tied

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[1] Petitioners will be referred to collectively as "Massey" except when the context requires specificity.

[2] A coking plant consists of "batteries" of massive ovens in which coal is turned into coke, which, in turn, is used in the production of steel. Tr. 936.

to changes in the Producer Price Index. Tr. 491, Pl. Ex. 1, Article VI. The contract contained a broad *force majeure* provision, which stated that Massey would not be liable for failures to deliver caused by,

> without limitation, acts of God, war, insurrection, riots, nuclear disaster, strikes, labor disputes, labor and material shortages, fires, explosions, floods, river freeze-ups, breakdowns or damage to mines, plants, equipment or facilities (including emergency outages of equipment or facilities or to make repairs to avoid breakdowns thereof of damage thereto), interruptions to transportation, railway car shortages, [or] barge shortages.

Pl. Ex. 1, Article XI. The contract remains in force today. Tr. 5230.

Wheeling Pitt's coking operations require coal with a specific chemical composition; accordingly, the contract includes detailed quality requirements. Tr. 1306, Pl. Ex. 1, Article III.1.2-1.4. Massey has satisfied these requirements by blending coals from different Massey mines. Tr. 702-03. To achieve the correct blend, the component coals have to arrive simultaneously at a barge terminal owned by a third party, where they are blended and then shipped to Wheeling Pitt. Tr. 702-03, 4494-95. Other steelmakers do not require the same blended, high-quality coal that Wheeling Pitt does. As a result, Massey can supply those customers with coal from a single mine. Tr. 1397-98.

In November 2003, after the Wheeling Pitt contract had been in place for a decade, Massey adopted a production budget for 2004. Tr. 3610-12. This budget was based on detailed production forecasts

for each mine and reflected input from more than 100 Massey employees over a six-month period. Tr. 3595.

After the 2004 budget was completed, China announced that it would no longer export coal. That development sharply limited the supply available to coal users in Asia, causing the price of metallurgical coal to rise substantially. Tr. 3619. In response to these conditions, Massey took steps to increase its coal production for 2004. Tr. 3611-12. It more than doubled capital expenditures, expanding production in certain mines and keeping open mines that it had planned to idle. Tr. 3621, 3623, 3734. Massey also identified coal sources that had been budgeted for sale to utility customers ("steam coal") that could also be suitable for purchase by steelmakers ("metallurgical coal"). Tr. 3621-22. In a further attempt to free up its own production for metallurgical customers, Massey purchased 900,000 tons of coal on the New York Mercantile Exchange, which it used to satisfy delivery obligations for steam coal. Tr. 3622-23.

Both sides agree that during 2004 Massey failed to meet Wheeling Pitt's coal requirements. Plaintiffs claimed that Massey's failure to deliver was the result of a plan to market metallurgical coal to new, mostly foreign, customers at market prices that far exceeded the contract price with Wheeling Pitt, then to issue false or trumped-up notices of *force majeure* to excuse non-delivery to Wheeling Pitt. Plaintiffs further contended that Massey executives failed to disclose their new sales and falsely promised that the shortages were temporary in order to convince Wheeling Pitt not to seek out new suppliers.

Plaintiffs admitted, however, that Massey did not affirmatively conceal these sales, which were

widely publicized in trade publications and Massey's 10-K. Pl. Ex. 398; Tr. 3437-38. Indeed, Wheeling Pitt's purchasing manager, Art Hartline, testified that he had read about Massey's sales to foreign customers and discussed them with a Massey sales director. Tr. 600-01.

Massey also introduced evidence that during 2004 it truly was hamstrung by events beyond its control. One chronic problem—confirmed by Wheeling Pitt's own employees and expert witness—was a nationwide railcar shortage. Tr. 1077-78. Specifically, as Massey's vice president for transportation testified, Massey did not receive as many railcars as it requested on the route from Massey's southern West Virginia mines to the Ohio River barge terminal where coal was blended and shipped for delivery to Wheeling Pitt. Tr. 4420, 4452-54.[3] Massey also suffered from industry-wide labor shortages, as competing mines opened up to take advantage of rising prices. Tr. 3570-71, 5018-19. In response, Massey announced wage increases and retention bonuses targeted at the categories of workers who were most needed. Tr. 3541-42, 3684-85. Meanwhile, severe weather and flooding on the Ohio River disrupted power supplies and barge traffic on several occasions in 2004 and 2005. Tr. 2328-30, 4649-50. During the same time period, as Wheeling Pitt's expert witness acknowledged, Massey also experienced problems in specific mines, including roof cave-ins, equipment breakdowns, methane explosions, and adverse geo-

[3] The shortage was exacerbated by CSX's decision to allocate more rail cars to profitable long-haul routes, such as the route between Massey's mines and the seaport at Newport News, and fewer cars to shorter, less-profitable routes, such as the line used to supply Wheeling Pitt. Tr. 5000.

logical conditions. Tr. 4196-4200, 4193-97. Other of Wheeling Pitt's coal suppliers were experiencing similar difficulties meeting their production obligations. Tr. 770 ("Bluestone had some—some terrible problems.").

CWVEC (the Massey subsidiary that was party to the Wheeling Pitt contract) sent Wheeling Pitt a total of 30 *force majeure* notices between the end of 2003 and February 2006. Pl. Exs. 165A-C. Though plaintiffs contended that the volume of notices was the result of Massey's sales strategy and further contended that certain events either were foreseeable or were at least partly within Massey's control, their own witnesses admitted that many of the specific events described in the *force majeure* letters (1) occurred and (2) affected coal production or delivery. Wheeling Pitt's former CEO testified, for example, that he "knew that there was hopper car shortages, flat car shortages, engine shortages. The whole country was strained with that infrastructure during that period of time because, you know, with the whole raw material thing." Tr. 1077. See also Tr. 717-20, 2327-29 (flooding), 2342-43, 2345, 2365, 2377 (roof cave-ins and other mining problems).

In addition to the formal *force majeure* notices, Massey employees communicated with Wheeling Pitt employees at various levels of seniority throughout this period about production and transportation problems and Massey's efforts to address them. Hartline discussed Wheeling Pitt's needs with Massey personnel, who responded that "[w]e'll see what we can do, we'll get you something." Tr. 570, 648 ("We'll work together and see what we can get you."). In June 2004, Blankenship discussed the delivery problems with his counterpart at Wheeling Pitt, CEO Jim

Bradley, who offered his views about how Massey could satisfy Wheeling Pitt's requirements. Bradley never suggested that the production and transportation problems were not real. Tr. 3626-28. Blankenship told Bradley that "he was going to try to do everything possible to make sure that we had coal, we would never run out of coal." Tr. 970. Indeed, as the trial court found, when Wheeling Pitt informed Massey that it would have to shut down unless it received more coal, Massey made extraordinary efforts to ensure that Wheeling Pitt received the needed coal. App., *infra*, 10a, ¶ 10.[4]

B. The Trial

In April 2005, frustrated by Massey's inability to deliver sufficient amounts of coal, Wheeling Pitt sued CWVEC for breach of contract. In May 2006, Wheeling Pitt amended its complaint to add a claim for misrepresentation and a demand for punitive damages. The amended complaint also added Massey as a defendant on the fraud claim.

The Amended Complaint alleged that

- when the market price of metallurgical coal rose, Massey issued "patently improper *force majeure* notices" and sold to foreign customers at higher prices, rather than to Wheeling Pitt (Am. Compl. ¶ 2)[5];

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[4] Bafflingly, the court characterized this act of good will as evidence of fraud, stating that it proved that Massey could get rail cars when it really wanted to. App., *infra*, 10a.

[5] The trial court granted summary judgment to defendants on this claim. See Order (May 18, 2007) at 6 ("this Court finds that Plaintiffs' claims for misrepresentation do not include Defendants' force majeure notices"). Inexplicably, however, the

- after the *force majeure* events began, Massey falsely assured Wheeling Pitt that it would "do better" and would "undertake efforts to enable [Massey] to fulfill its obligations under the" contract (Am. Compl. ¶¶ 92, 95, 96-98); and
- Massey failed to disclose that it was entering into contracts with new customers at higher prices than Wheeling Pitt was paying (Am. Compl. ¶ 93).

The jury found CWVEC liable for breach of contract and both defendants liable for fraud. Tr. 5563-66. It awarded $119 million in compensatory damages and also imposed $50 million in punitive damages against each defendant. Tr. 5583.

C. Post-Trial Review of the Punitive Award

Massey filed post-trial motions, arguing, *inter alia*, that it was improper under West Virginia law to impose punitive damages for what essentially was a breach-of-contract claim; that, in any event, the conduct alleged did not support punitive damages; and that the amount of punitive damages was excessive

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court later relied on the notices in upholding the punitive award. App., *infra*, at 11a-12a ("Defendants alleged that a non-existent railcar shortage was the reason that they could not supply Plaintiffs with the coal they were contracted to sell."). In filling out the verdict form for the breach-of-contract claim, the jury answered "no" to the question whether the incidents described in the *force majeure* notices "actually occurred and were the reasons for the shortages." Tr. 5563. It never found by clear and convincing evidence (as was required for the fraud claim), however, that any particular notice was fraudulent. Nor was such a finding necessary to its fraud verdict, which could have rested on representations made by Massey about its intentions to do all it could to supply Wheeling Pitt with as much coal as possible or failures to disclose the existence of new sales contracts.

under state and federal law. App., *infra*, 20a-31a. In support of its contention that the punitive damages were excessive, Massey introduced uncontradicted expert testimony that, accepting *arguendo* plaintiffs' fraud theory, the maximum "profit" to Massey from its allegedly tortious conduct was no more than $52 million. Ex. A to Defs.' Mot. to Review Punitive Damages Award (Sutphin Aff.). It accordingly argued that the compensatory damages and prejudgment interest were more than sufficient to punish and deter, making the $100 million in punitive exactions grossly excessive. Wheeling Pitt meanwhile moved to "affirm" the punitive award. The trial court denied Massey's motions and upheld the full amount of punitive damages. App., *infra*, 13a-14a, 16a.

The court identified three representations or omissions that it regarded as fraudulent: (1) "the fraudulent affirmative statement that [defendants] could not control the allocation of railcars"; (2) assurances that Massey "would do everything possible to supply the requisite coal"; and (3) the failure to "disclose that [defendants] had other international customers paying substantially higher prices for their coal." App., *infra*, 10a, 11a. The court found that Massey thereby "le[ft] Plaintiffs in an unfortunate position," increased "the length of time that Plaintiffs continued to suffer damages" and "the amount of their damages," and caused plaintiffs "to remain in the contract resulting in harm to Plaintiffs." *Id.* at 11a.

In upholding the $100 million punitive exaction, the court stated that "[t]he punitive damage award in this case bears a reasonable relationship to the harm caused by Defendants' conduct as well as to the

compensatory damages awarded, considering that the combined punitive damages are less than the compensatory damage award" and that "Defendants' conduct is also found to be reprehensible." App., *infra*, at 11a. The court never explained why the conduct was "reprehensible" enough to warrant a nine-figure punishment. Nor did it provide any reason to think that a punitive award of this magnitude was necessary for punishment and deterrence. In fact, it found that the compensatory award alone exceeded Massey's "profit" from the alleged scheme. App, *infra*, 13a; July 30, 2007 Hrg. Tr. at 87-88.

Massey and CWVEC petitioned the West Virginia Supreme Court of Appeals for review, arguing, among other things, that the punitive awards were unconstitutionally excessive. Pet. for Appeal by CWVEC 63-84; Am. Pet. for Appeal of Massey Energy 54-74. The petitions were denied without comment. App., *infra*, at 17a-18a.

REASONS FOR GRANTING THE PETITION

Over the past decade and a half, this Court repeatedly has expressed concern about punitive damages awards that, "today, may be many times the size of such awards in the 18th and 19th centuries." *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064 (2007). Although "runaway awards" may not be "mass produced" by American courts (*Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2624 (2008)), such awards are hardly rare—and they are often imposed arbitrarily, rather than being reserved for the rare cases in which an enormous penalty is needed to accomplish the State's legitimate interests in punishment and deterrence. *Id.* at 2625-26. Alarmed by the increasingly large exactions being imposed by juries and sustained by the lower courts, this Court

has found itself compelled to remind bench and bar that a $2 million punitive award is "tantamount to a severe criminal penalty" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996)) and to explain that such a substantial exaction "cannot be justified on the ground that it [is] necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal" (*id.* at 584). See also *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419-20 (2003) ("a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further").

Unfortunately, lower courts often lose sight of the forest for the trees, eschewing the required case-specific determination of whether the absolute amount of punitive damages is necessary for punishment and deterrence in favor of rote application of the three excessiveness guideposts identified by this Court in *BMW*. This problem is manifested in three recurring misconceptions. The first is the treatment of reprehensibility as a binary rather than a relative and comparative concept, which leads courts to conclude that large punitive damages are appropriate whenever conduct can be labeled "reprehensible." The second is the belief that a quantitatively "reasonable" relationship between punitive and compensatory damages is a safe harbor that supplants the basic principle that a punitive award can be no "greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991). And the third is that the fines meted out in the criminal process and by expert regulatory agencies are of no relevance except in the rare instances in which they are both large and directly applicable to the conduct at issue.

As a consequence, although civil trials lack the safeguards of criminal proceedings, and civil juries lack the expertise, investigative resources, time, and perspective of regulatory agencies, reviewing courts continue to stand idly by as punitive awards spiral upward. Indeed, the $100 million exaction in this case was only the third largest upheld by the courts of West Virginia in 2007.[6] And West Virginia is not the only State in which nine-digit punitive awards have become common. See Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. L. STUD. 1, 6–8 (Jan. 2004) (listing 63 punitive awards over $100 million between 1985 and 2003).

The imposition of awards of this magnitude raises serious due process concerns that are not alleviated by superficial application of the guideposts. Review is urgently needed to remind the lower courts that the guideposts are meant to assist in determining whether the *absolute* amount of a punitive award is excessive in relation to the State's interests in retribution and deterrence.

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[6] The largest ($270 million) is the subject of a petition for certiorari that is being filed by NiSource, Inc. and Chesapeake Energy contemporaneously with this one. The second largest, $196.5 million against DuPont, is the subject of a pending petition for review in the West Virginia Supreme Court. See Lawrence Messina, *Manchin seeks review of $400 million DuPont case*, CHARLESTON DAILY MAIL, July 2, 2008, available at http://www.dailymail.com/News/200807020321.

A. This Court Has Repeatedly Expressed Concerns About Large Punitive Awards And Identified Several Risks That Require Caution In The Imposition Of Punitive Damages.

This Court has long cautioned that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994).[7] In recent years, the Court has either struck down or articulated doubts about large punitive awards on several occasions.

In *BMW*, the Court held that a $2 million punitive award was unconstitutionally excessive, explaining that "a lesser deterrent" would suffice to satisfy the State's interest in deterring misconduct. 517 U.S. at 584. Five years later, the Court expressed grave doubts about the sustainability of a $4.5 million punitive award, observing that the court of appeals' ruling upholding the exaction was based on "a series of questionable conclusions by the District Court" that "likely" could not be sustained on a "thorough, independent review" of the record. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). And just two years after that, the Court held a $145 million punitive award unconstitutionally excessive, stating that "a more modest punishment for this reprehensible [fraudulent] conduct could have satisfied the State's legitimate objectives, and the

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[7] That danger is all the more severe when, as here, an out-of-state business is sued by a local plaintiff. The trial in this case was held a few miles from the Wheeling Pitt coke plant. Plaintiffs' counsel made sure that the fact that Wheeling Pitt was a local employer was not lost on the jury. See, *e.g.*, Tr. 5469 (non-delivery of coal "put an entire community * * * who was dependent on that company, in jeopardy").

Utah courts should have gone no further." *State Farm*, 538 U.S. at 419-20. In all, the Court suggested that "a punitive damages award at or near the amount of compensatory damages"—$1 million—was likely the constitutional maximum. *Id.* at 429.

In these and other cases, the Court articulated a range of concerns about punitive damages.

First, although punitive damages "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417.

Second, civil juries are typically subject to few constraints, lack the expertise and perspective of regulators, and may harbor sympathies toward local plaintiffs (like Wheeling Pitt). This creates a severe risk that the jury will choose an amount of punitive damages that is "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585) and that dwarfs "the size of such awards in the 18th and 19th centuries," even after adjusting for inflation (*Philip Morris*, 127 S. Ct. at 1064).

Third, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose[,] * * * constitutes an arbitrary deprivation of property," and violates "'elementary notions of fairness.'" *State Farm*, 538 U.S. at 417 (quoting *BMW*, 517 U.S. at 574); see also *Philip Morris*, 127 S. Ct. at 1062 (emphasizing the risk that a State's punitive damages system "may deprive a defendant of fair notice of the severity of the penalty that a State may impose" and "threaten arbitrary punishments, *i.e.*, punishments that reflect not an application of law but a decisionmaker's ca-

price") (internal quotation marks and ellipses omitted).

Fourth, if a punitive award is "sufficiently large," it may, in practical effect, "impose one State's (or one jury's) policy choice * * * upon neighboring States with different public policies." *Philip Morris*, 127 S. Ct. at 1062 (internal quotation marks omitted).

Because of these concerns, the Court "has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Philip Morris*, 127 S. Ct. at 1062. Most important for present purposes, the Court has held that the Due Process Clause prohibits the imposition of punitive damages in amounts that are excessive in relation to the State's interests in retribution and deterrence. More particularly, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.[8] And even when it is determined that *some* amount of punitive damages is necessary, the

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[8] As this Court has explained, "[p]unitive damages aside," "[d]eterrence * * * operates through the mechanism of damages that are *compensatory*." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-07 (1986); see also 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) ("if the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages").

question remains "whether a lesser deterrent would have adequately" served the State's interests. *BMW*, 517 U.S. at 584; see also *State Farm*, 538 U.S. at 419-20 ("a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further"); cf. *Exxon Shipping*, 128 S. Ct. at 2633 (recognizing "need to protect against the possibility * * * of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution").

This required inquiry necessitates careful scrutiny of the absolute amount of the punitive damages. To assist the lower courts in conducting that scrutiny, this Court has identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of the punitive damages to the harm to the plaintiff (typically measured by the compensatory damages); and (iii) the civil fines authorized or imposed for similar conduct. *BMW*, 517 U.S. at 574-85.

The first guidepost requires courts to ask whether the conduct is heinous enough to warrant the amount of punishment imposed. In other words, the "punishment should fit the crime." *BMW*, 517 U.S. at 575 n.24. It therefore is not sufficient to ask "Is the conduct bad?"; the conduct has to be egregious to warrant *any* punitive damages in the first place. Moreover, while necessary, it does not suffice to ask "How does this conduct compare to other punishable conduct?"[9] Instead, for this guidepost to serve as a constraining force, courts must also ask whether "the extraordinary size of the award * * * is explained by

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[9] The court below did not do even this much.

the extraordinary wrongfulness of the defendant's behavior" (*id.* at 595 (Breyer, J., concurring)).

The second guidepost is designed to ferret out punitive awards that are so disproportionate to the harm caused by the misconduct as to render their reasonableness suspect. Of course, in many cases "the ratio [of punitive damages to harm] will be within a constitutionally acceptable range, and remittitur will not be justified *on this basis*." *BMW*, 517 U.S. at 583 (emphasis added). But that in no way means that punitive awards that are comparatively small multiples of the compensatory damages are immune from invalidation. As this Court has emphasized, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426. An award that is the same size as or lower than the compensatory damages might not be disproportionate, but it still could be unreasonable in light of the facts and circumstances, which include the extent to which the compensatory damages and other costs incurred by the defendant as a result of its conduct already serve to punish and deter.

The third guidepost addresses three significant concerns. First, principles of comparative institutional competence warrant giving "substantial deference" to "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (internal quotation marks omitted). Second, the magnitude of applicable civil penalties bears on whether the defendant had "fair notice" of the size of the punishment to which it could be subjected. *Id.* at 584. Finally, this guidepost accounts for the fact that juries lack the expertise, perspective, and re-

sources of expert regulatory agencies. When exercising their sanctioning powers, regulatory agencies have the time, expertise, and resources to conduct a full and impartial investigation. They also have knowledge of the regulatory backdrop and of the spectrum of punishable conduct, which enables them to "assure the uniform general treatment of similarly situated persons that is the essence of law itself" (*Cooper Indus.*, 532 U.S. at 436 (internal quotation marks omitted)). Consideration of the penalties provided by statute and, even more importantly, the expert agency's actual fining practice, is therefore essential in determining whether the punitive damages exceed the amount reasonably necessary to punish and deter. As Justice Breyer has aptly put it in an analogous context, it is "anomalous" to "grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring).

Used properly, the three guideposts are well suited to their assigned task of assisting courts in determining whether a punitive award is excessive in relation to the State's legitimate interests in retribution and deterrence. Regrettably, this case and others reflect that many lower courts have lost sight of this ultimate inquiry and accordingly need further guidance on the purpose and proper application of the guideposts.

B. The Lower Courts Have Lost Sight Of The Concerns Underlying This Court's Punitive Damages Cases.

The court below rubber-stamped a $100 million punitive exaction based on the bald statement that Massey's conduct was "reprehensible" and the fact

that the compensatory damages exceed the punitive damages. In so doing, it neglected to address the central inquiry: whether an exaction of this enormous magnitude is necessary to punish and deter. Had it focused on that inquiry, it would have been obliged to recognize that, in the scheme of things, misleading a sophisticated business about one's intentions to fulfill one's contractual duties ranks quite low in the array of punishable torts and pales in comparison with conduct that has resulted in far lower amounts of punitive damages. It also would have had to acknowledge that its finding that the compensatory damages far exceed the "profit" from Massey's conduct means that the compensatory damages alone largely, if not entirely, fulfill the deterrent objective. And it further would have had to recognize that the fact that the punitive award dwarfs the criminal fines that may be imposed in West Virginia for more egregious conduct and the civil penalties that expert West Virginia regulatory agencies typically impose is a further compelling indication that the punitive award serves no valid state interest and therefore is an arbitrary deprivation of property.

Moreover, the analytical errors committed by the court below are by no means aberrational. Courts throughout the country routinely make these kinds of errors in upholding ever-increasing amounts of punitive damages.

For example, many courts treat reprehensibility as an on-off switch: As long as the conduct can be labeled "reprehensible" (and what conduct satisfying the standards for punitive liability can't be?), these courts move on to the next guidepost without ever asking whether the *degree* of reprehensibility is suf-

ficient to warrant a penalty of the magnitude at issue.[10] The courts plainly need reminding that the entire point of the reprehensibility inquiry is to determine whether the conduct was "*especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed (*BMW*, 517 U.S. at 590 (Breyer, J., concurring)), an exercise that requires comparing the conduct at issue to other punishable conduct.

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[10] See, *e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005); *Winkler* v. *Petersilie*, 124 F. App'x 925, 937 (6th Cir. 2005); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-71 (Fed. Cir. 2003); *Bogle* v. *McClure*, 332 F.3d 1347, 1361 (11th Cir. 2003); *Lopez* v. *Aramark Uniform & Career Apparel, Inc.*, 426 F. Supp. 2d 914, 969-70 (N.D. Iowa 2006); *Jurinko* v. *Med. Protective Co.*, 2006 WL 785234, at *6-*7 (E.D. Pa. Mar. 29, 2006) (unpublished); *Hussein* v. *Universal Dev. Mgmt., Inc.*, 2006 U.S. Dist. LEXIS 49, at*29-*31 (W.D. Pa. Jan. 3, 2006); *Shiv-Ram, Inc.* v. *McCaleb*, 892 So. 2d 299, 316 (Ala. 2003); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 360-61 (Ark. 2003); *Super. Fed. Bank* v. *Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 651 (Ark. Ct. App. 2005); *Wrysinski* v. *Agilent Techs., Inc.*, 2006 WL 2742475, at *25 (Cal. Ct. App. Sept. 27, 2006) (unpublished); *Century Sur. Co.* v. *Polisso*, 43 Cal. Rptr. 3d 468, 498-99 (Ct. App. 2006); *Craig* v. *Holsey*, 590 S.E.2d 742, 747-48 (Ga. Ct. App. 2003); *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428, 446-47 (Kan. 2006); *Grefer* v. *Alpha Technical*, 901 So. 2d 1117, 1148-49 (La. Ct. App. 2005), vacated sub nom. *Exxon Mobil Corp.* v. *Grefer*, 127 S. Ct. 1371 (2007); *Bright* v. *Addison*, 171 S.W.3d 588, 603-04 (Tex. Ct. App.–Dallas 2005, pet. denied); *Mission Res., Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301, 318 (Tex. Ct. App.–Corpus Christi 2005, pet. granted); *Haggar Clothing Co.* v. *Hernandez*, 164 S.W.3d 407, 418-19 (Tex. Ct. App.–Corpus Christi 2003), rev'd per curiam on other grounds, 164 S.W.3d 386 (Tex. 2005); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 414-17 (Utah 2004).

Similarly, like the court below, numerous lower courts have treated a low ratio of punitive to compensatory damages as a safe harbor, upholding multi-million-dollar punitive awards without regard to the degree of reprehensibility of the conduct or the extent to which the compensatory damages and other costs borne by the defendant as a result of its conduct already serve the interests of retribution and deterrence.[11] By contrast, only a few courts have

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[11] See, *e.g.*, *Cambio Health Solutions, LLC* v. *Reardon*, 234 F. App'x 331, 339 (6th Cir. 2007) (upholding $5 million punitive award that was 5.65 times the compensatory damages and prejudgment interest of $884,291.18 because it was "well within the Supreme Court's single-digit prescription"); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (holding that $2 million punitive award was permissible, even though "the compensatory damages award [of $500,000] is substantial * * * and the punitive damages award is many times [the defendant's] net worth" because this Court approved a 4:1 ratio in *Haslip*); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. 2004) (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Rhone-Poulenc*, 345 F.3d at 1372 (taking no account of the absolute amount of the punitive award ($15 million) and reasoning that the 3.33:1 ratio of punitive to compensatory damages "does not even approach the possible threshold of constitutional impropriety"); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding $2.6 million punitive award where compensatory damages were $260,000 because the ratio was "slightly more than seven to one" and "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages"); *Bogle*, 332 F.3d at 1362 (upholding approximately $2 million in punitive damages to each of seven defendants despite "substantial" compensatory damages of $500,000 because the ratio "in this case is in the neighborhood of 4:1, a range which

conducted the broader inquiry into whether and to what extent the compensatory damages and other costs borne by the defendant as a consequence of its conduct serve the State's interests in retribution and deterrence, rendering even a 1:1 ratio excessive.[12]

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the Supreme Court has found to be 'instructive'"); *Barber*, 149 S.W.3d at 348 (upholding $25 million punitive award, even though compensatory damages were $5.1 million, because 5:1 ratio was not "breathtaking"); *Advocat*, 111 S.W.3d at 361 (allowing $21 million punitive award that was 4.2 times the remitted compensatory damages of $5 million, because a ratio of 4.2:1 is not "breathtaking"); *Seltzer* v. *Morton*, 154 P.3d 561, 611 (Mont. 2007) (permitting $9.9 million in punitive damages where compensatory damages were $1.1 million because "substantial compensatory damages do not always require low single-digit ratios"); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court" and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Campbell*, 98 P.3d at 418 (upholding $9,018,780.75 in punitive damages on remand—a 9:1 ratio—even though this Court suggested that the constitutional maximum was around $1 million).

[12] See, *e.g.*, *Chicago Title Ins. Corp.* v. *Magnuson*, 487 F.3d 985, 998–1001 (6th Cir. 2007) (barring punitive damages in retrial on claim for tortious interference with contract because plaintiff could not prove that "'the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence'") (quoting *State Farm*, 538 U.S. at 419), cert. denied, 128 S. Ct. 1125 (2008); *Inter Med. Supplies, Ltd.* v. *EBI Med. Sys., Inc.*, 181 F.3d 446, 467-70 (3d Cir. 1999) (reducing $50 million punitive award for breach of contract and fraud to $1 million because "large compensatory damages [$48 million] have been awarded" and the harm was economic "and hence 'less worthy of large punitive damages awards than torts inflicting injuries to health or safety'"); *Pichler* v. *UNITE*, 457 F. Supp. 2d 524, 530-32 (E.D. Pa. 2006) (disallowing punitive damages against union for willful and reckless violation of the Driver's Privacy Protection Act, 18 U.S.C. § 2724, because

Finally, most lower courts have failed to appreciate the relevance of the third guidepost. A punitive award that is tens of millions of dollars greater than the criminal fines that could be imposed for more serious conduct after a defendant has been provided with the full panoply of criminal-procedure safeguards is surely one that grossly exceeds the amount reasonably necessary to punish and deter. The same is true of a punitive award that far exceeds the range of civil penalties typically imposed by regulatory agencies after conducting thorough and expert investigations. Yet the overwhelming majority of courts have disregarded the third guidepost precisely because the punitive damages are much larger than the fines doled out in the criminal and administrative forums or because the conduct at issue isn't serious enough to be subject to criminal or administrative sanctions.[13]

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statutory damages of over $4 million and other fees and costs would provide "ampl[e]" punishment and deterrence "without imposing punitive damages"); *United States* v. *Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (vacating $3 million punitive award for civil theft and conversion "in its entirety" because the plaintiff received $2 million in compensatory damages and the defendant's conduct did "not warrant the imposition of further sanctions to achieve punishment or deterrence"), aff'd, 419 F.3d 1208 (11th Cir. 2005).

[13] See, *e.g.*, *ConAgra, Inc.* v. *Turner*, 776 So. 2d 792, 798 (Ala. 2000) (per curiam) ("[T]he parties agree that the legislature has created no criminal sanctions or penalties that apply to the retaliatory discharge of an employee. Therefore, this factor does not apply in mitigation of the punitive damages award.") (adopting lower court opinion); *BMW of N. Am., Inc.* v. *Gore*, 701 So. 2d 507, 514 (Ala. 1997) ("Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award * * *."); *Aken* v. *Plains Elec. Generation &*

C. The Present Case Is An Ideal Vehicle For Addressing This Recurring Misunderstanding Of The Excessiveness Inquiry.

The present case is an ideal vehicle for providing the lower courts with needed guidance about the proper excessiveness inquiry.

Transmission Co-op., 49 P.3d 662, 672 (N.M. 2002) ("As the Supreme Court of Alabama noted in *BMW* on remand, when statutory penalties for the conduct in question are low or do not exist, 'a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award.'") (quoting *BMW*, 701 So. 2d at 514); *Santos* v. *STS Enters., Inc.*, 2005 WL 3776321, at *7 (N. Mar. I. 2005) ("We need not focus on guidepost three because there are no applicable civil penalties with which to compare the punitive damages awards."); *James* v. *Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006) (legislative penalties have little relevance when they "are set at such a low level, there is little basis for comparing it with any meaningful punitive damage award") (internal quotation marks omitted); *Schwigel* v. *Kohlmann*, 694 N.W.2d 467, 475 (Wisc. Ct. App. 2005) (ignoring third guidepost because "the conduct exhibited here could scarcely have been contemplated by the legislature when it enacted these statutes") (internal quotation marks and alterations omitted); *Boyd* v. *Goffoli*, 608 S.E.2d 169, 184 (W. Va. 2004) (it is "[a]pparent * * * that the Supreme Court did not believe that a punitive damages award one hundred times greater than the civil penalty that could be imposed for such conduct was excessive"); *Campbell*, 98 P.3d at 419 (holding that a punitive award that is 900 times the applicable maximum fine is "in line with the third *Gore* guidepost"); *Sherman* v. *Kasotakis*, 314 F. Supp. 2d 843, 875-76 (N.D. Iowa 2004) ("[I]n this case, there are no comparable civil penalties—which is precisely the reason that the federal government implemented statutes that would protect an individual's civil rights. For this very reason, some courts have found the third guidepost of limited utility in assessing the reasonableness of a punitive damages award for a civil rights violation.").

The misconduct alleged in this case—false reassurances made by one sophisticated merchant to another relating to a commercial contract, misstatements of the effect that *force majeure* events—most of which were conceded to have occurred—had on the defendants' ability to perform under that contract, and non-disclosures of transactions with third parties that were a matter of public record and that the parties in fact discussed—falls at the very low end of the reprehensibility scale. Indeed, it is highly questionable that Massey's conduct can even be characterized as tortious: Prior to this case, recognizing the strong incentive for plaintiffs to shoehorn their contract claims into tort theories in order to recover punitive damages, the West Virginia courts had consistently barred tort claims arising out of contractual relationships.[14]

Moreover, whether or not West Virginia ever before had treated conduct like this as tortious, there can be no serious doubt that Massey acted without malice and that, however denominated, its conduct

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[14] See, *e.g.*, *Cochran* v. *Appalachian Power Co.*, 246 S.E.2d 624, 628 (W. Va. 1978) ("If the plaintiff states a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not convert the cause of action into one for tort * * *."); *Lockhart* v. *Airco Heating & Cooling, Inc.*, 567 S.E.2d 619, 624 (W. Va. 2002) ("Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation."); *CWS Trucking, Inc.* v. *Welltech E., Inc.*, 2005 WL 2237788, at *2–*3 (N.D. W. Va. Sept. 14, 2005) (dismissing tort claim that was "dependent on the contract" because "West Virginia falls within the group of jurisdictions that will not allow both contract and tort claims arising from contractual circumstances").

pales in comparison to the acts of murder and torture at issue in *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); the "true threats" of murder and mayhem involved in *Planned Parenthood* v. *American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005); the violent batteries committed in *Estate of Moreland* v. *Dieter*, 395 F.3d 747, 757 (7th Cir. 2005) ("discharg[ing] a canister of pepper spray into the face of a fully restrained, incapacitated individual" and "throw[ing] [the] man's head against concrete," resulting in death) and *DiSorbo* v. *Hoy*, 343 F.3d 172, 187 (2d Cir. 2003) ("violently slamm[ing] [prisoner] against the wall, chok[ing] her to the point where she began to lose vision, push[ing] her to the ground, and [striking] her while she was on the ground"); the deliberate acts of insurance bad faith targeted at vulnerable senior citizens at issue in *State Farm*; or even the business tort involved in *Eden Electrical, Ltd.* v. *Amana Co.*, 370 F.3d 824 (8th Cir. 2004), which was motivated by an intent to "f* * *" and "kill" the plaintiff financially (*id.* at 829). Yet with the exception of *Hilao*, a class action brought on behalf of thousands of victims, the punitive award here dwarfs the exactions in these cases of undeniably more egregious conduct.

Moreover, the undisputed evidence in this case was that the "profit" from Massey's alleged conduct could not have exceeded $52 million. See pages 10-11, *supra*. That caused the trial court to acknowledge that the $119 million compensatory award alone equaled or exceeded the profits from the misconduct. App, *infra*, 13a. Moreover, the trial court awarded $24 million in prejudgment interest, which was calculated at the above-market rate of 10% per annum. When prejudgment interest is pegged materially above the market rate, the portion that exceeds

the market rate has both punitive and deterrent effects.

Finally, the $100 million exaction far exceeds the criminal fines for conduct that is undeniably more serious. For example, the maximum fine for bank fraud is $10,000. W. VA. CODE § 31A-8-9; see also, *e.g.*, *id.* § 32A-1-2 (false advertising: $2,000); *id.* § 46A-5-103 (willful violations of consumer protection act: $5,000 fine (adjusted for inflation)); *id.* § 61-3-24 (larceny: $2,500). Similarly, although commercial contracts are not supervised by any administrative agencies in West Virginia, if Massey had violated mine safety rules or engaged in environmental violations, the penalty likely would have been tens of millions of dollars lower than the punitive award in this case. See *Taylor* v. *Culloden Pub. Serv. Dist.*, 591 S.E.2d 197, 200, 201 n.10 (W. Va. 2003) (discussing $100,000 fine against public sewage authority for discharging raw sewage into a waterway); *In re T & T Fuels, Inc.*, 2001 WL 34348825, at *1 (N.D. W. Va. 2001) (discussing $6.7 million fine for "a large breakout of acid-laden [mine drainage] water [that] began to discharge directly into the waters of West Virginia"), aff'd per curiam, 55 F. App'x 121 (4th Cir. 2003); Bloomberg, *Mine Where Explosion Occurred Was Cited for Hazards (Update3)*, Jan. 4, 2006 ("Mines can face a maximum [federal] fine of $60,000 or can be closed down if serious violations are found."; describing 208 citations, ranging from $60 to $440, to operator of Sago, West Virginia mine, where 12 miners died in accident).

In short, if the three guideposts had been applied with a view toward determining whether $100 million exceeds the amount necessary to deter and punish, there can be no question that the outcome in this

case would have been dramatically different. The case therefore is a good one for demonstrating the proper analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2008

APPENDIX

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APPENDIX A
[Opinion of the Circuit Court of Brooke County, West Virginia (Aug. 2, 2007)]

IN THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC,

Plaintiffs,

v.

CENTRAL WEST VIRGINIA ENERGY COMPANY and MASSEY ENERGY COMPANY,

Defendants.

Civil Action No: 05-C-85

ORDER

This matter came before the Court on the 30th day of July 2007 for hearing on Motions filed by the parties subsequent to the jury trial in this matter. The Court heard argument from counsel on Defendant, Central West Virginia Energy Company's Motion for Judgment as a Matter of Law as to the Claims asserted in its First Supplement to Counterclaim against Plaintiff, Mountain State Carbon, LLC. The Court heard argument from counsel, as well as testimony of Plaintiffs' witness, on Plaintiffs' Motion to include Pre-Judgment Interest. Finally, the Court heard oral argument on Plaintiffs' Motion for the Court to Affirm the Jury's Award of Punitive Damages. The Court has reviewed the Motions, the Responses thereto, and the memoranda of law; considered all papers of record;

heard the arguments of counsel; and reviewed all pertinent legal authorities.

Plaintiffs appeared by counsel, David B. Fawcett, Esquire and Gregory J. Krock, Esquire of Buchanan, Ingersoll & Rooney, P.C., and David F. Cross, Esquire of Cross Law Offices; Defendant, Central West Virginia Energy Company, appeared by counsel James A. Walls, Esquire and Matthew P. Heiskell, Esquire of Spilman Thomas & Battle, PLLC; Defendant, Massey Energy Company, appeared by counsel W. Henry Jernigan, Jr., Esquire, of Dinsmore & Shohl, LLP.

[2] Counterclaim of Defendant, Central West Virginia Energy Company

Defendant, Central West Virginia Energy Company, previously moved this Court for leave to file a Supplemental Counterclaim which leave was granted by the Court. The Court orally ruled that such counterclaim was strictly an issue of law that would be determined by the Court at the conclusion of the trial. The Court received no response from Plaintiffs to the Counterclaim. After the trial, Defendant moved for judgment as a matter of law. The Court received Plaintiffs' response to Defendant's Motion at the hearing.

Defendant argues that Plaintiff, Mountain State Carbon, did not pay the contractually agreed upon price for coal shipments made in November 2006 and December 2006. It is the position of Defendant that the contract amount per ton of coal changed effective November 1 of 2006 pursuant to the written agreement between the parties establishing the contractual year to be November 1 through October 31. Plaintiffs requested an opportunity to respond

arguing that the parties established a course of conduct that altered the contractual year to a calendar year.

After reviewing the Motion of Defendant, the Response thereto, and the memoranda of law; considering all papers of record; hearing the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) The issues raised by Defendant's Counterclaim are strictly legal issues.

2) In order to determine the legal issues raised by the Counterclaim, the contract between the parties must be interpreted.

3) "It is the province of the court, and not of the jury, to interpret a written contract." Syl. Pt. 1, *Orteza v. Monongalia County General Hosp.*, 173 W.Va. 461, 318 S.E.2d 40 (1984) quoting Syl. Pt. 1, *Stephens v. Bartlett*, 118 W.Va. 421, 191 S.E.2d 550 (1937). [3]

4) "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, *Orteza v. Monongalia County General Hosp.*, 173 W.Va. 461, 318 S.E.2d 40 (1984) quoting Syl. Pt. 2, *Bethlehem Mines Corp. v. Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969).

5) The Coal Supply Agreement entered into between the parties is not ambiguous; therefore, the Court cannot look outside of the contract in making its determination regarding Defendant's Counterclaim.

6) In making its determination with regard to Defendant's Counterclaim, the Court did not consider any affidavits or trial testimony, but, rather, based its determination on the actual language of the contract between the parties.

7) The Coal Supply Agreement clearly defines the contract year to be November 1 through October 31; therefore, any modification to the price of coal made pursuant to the agreement between the parties would become effective November 1st of each contract year.

8) Defendant, Central West Virginia Energy Company, shipped to Plaintiff, Mountain State Carbon, 122,287 tons of coal in November and December 2006.

9) The price of coal increased by $34.65 per ton effective November 1, 2006.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Defendant, Central West Virginia Energy Company's Counterclaim against Mountain State Carbon is GRANTED; therefore, Defendant, Central West Virginia Energy Company, is entitled to an offset of the verdict rendered against it in the amount of $4,237,269.84 plus pre-judgment interest in the amount of $262,570.74; therefore, judgment is entered for Defendant, Central West Virginia Energy Company, on its counterclaim in the amount of $4,499,840.58.

[4] Prejudgment Interest

Plaintiffs moved the Court to include prejudgment interest at the rate of 10% on the jury verdict. Defendants argued that a recent statutory

change in West Virginia lowered the interest rate to 9.75% of a portion, if not all, of the jury's award.

After reviewing the Motion of Plaintiffs; considering all papers of record; hearing the testimony of Plaintiffs' witness and the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) The West Virginia Legislature amended the statutory interest rate in June 2006 by amending *W. Va. Code § 56-6-31.*

2) Pursuant to this Amendment, the Supreme Court of Appeals of West Virginia entered an Administrative Order on the 2nd day of January 2007 establishing the rate of interest for the year 2007 to be 9.75% as determined by applying the standards set forth in *W. Va Code § 56-6-31.*

3) For all applicable time periods prior to 2007, the statutory rate of interest was 10%.

4) Plaintiffs argue that their judgment falls within an exception set forth in *W. Va Code § 56-6-31*, because the damages fell within the definition of special damages excluding it from the requirements of applying the lesser interest rate.

5) If an award falls within this exception, the applicable rate of interest is the interest rate from the year in which the right to bring the action accrued.

6) Plaintiffs' jury award does, in fact, fall within the statutory exception; therefore, Plaintiffs are entitled to receive pre-judgment interest in the

amount of interest from the year in which the right to bring the action accrued; that being 10%.

7) Plaintiffs offered the testimony of their financial expert along with a report that he prepared calculating the amount of pre-judgment interest. [5]

8) Plaintiffs' expert testified that pre-judgment interest on the jury's verdict at the rate of 10% would be Twenty-Four Million Fifty-Three Thousand Six Hundred Sixty-Nine Dollars ($24,053,669)

9) Plaintiffs' expert testified as an expert in his field that his basis for calculation was reasonable and acceptable in his profession.

10) Defendants did not produce any rebuttal evidence, but argued that and Plaintiffs' expert did not properly calculate the interest because he used the wrong dates when making his calculations.

The Court finds that the evidence produced by Plaintiffs was the best information available to the Court.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion to include Pre-Judgment Interest at the rate of 10% in the amount of Twenty-Four Million Fifty-Three Thousand Six Hundred Sixty-Nine Dollars ($24,053,669) is GRANTED.

Punitive Damages Award

Plaintiffs' moved the Court to affirm the Jury's Award of Punitive Damages because the conduct of Defendants was reprehensible when they made fraudulent misrepresentations to induce Plaintiffs to remain in the contract knowing that they would not

supply Plaintiffs with the requisite coal in order to sell the coal to other customers at a higher price.

Defendants argue that their actions were not reprehensible, that the jury's verdict was clearly an award for breach of contract damages as opposed to a tort claim, and that such an award could lead to other claims that would be detrimental to their companies. Defendants assert that the only way the jury could have found fraud was to conclude that Defendants had an obligation to disclose to Plaintiffs their sales to other customers, which Defendants assert that no such duty existed.

[6] After reviewing the Motion of Plaintiffs, the Response thereto, and the memoranda of law; considering all papers of record; hearing the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) "Punitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt. 1, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

2) "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation

only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant."

[7] Syl. Pt. 3, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

3) "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." Syl. Pt. 4, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

4) Most, if not all, of the *force majeure* notices that this Court held valid on their face alleged that Defendants could not supply the requisite coal to Plaintiffs due to a railcar shortage.

5) The jury verdict form contained a specific question regarding the underlying incidents set forth in the *force majeure* notices.

6) The jury did not find that the underlying incidents set forth in the *force majeure* notices actually occurred and were the reasons for the coal shortages to Plaintiffs.

7) Based upon the jury's answers on the verdict form, it is clear the jury found the *force majeure* notices without a legal, factual basis. [8]

8) In order for the jury to find that the *force majeure* notices were without a legal, factual basis, the jury must have concluded that Defendants created the railcar shortage by requesting that the rail carrier send more of its cars for shipment to higher paying customers.

9) Defendants made the fraudulent affirmative statement that they could not control the allocation of railcars.

10) However, the Court found it very suggestive of Defendants' ability to control the allocation of railroad cars when Plaintiff, Wheeling Pittsburgh Steel Corporation, advised Defendants it would have to shut down because they could not receive barge shipments, Defendants were able to immediately ship coal by railcars all of the way to Follansbee.

11) Moreover, it was in Defendants' best interest to keep Plaintiffs in the contract. If Defendants were found guilty of a breach and Plaintiffs were permitted to purchase coal from other suppliers, Defendants would have been forced to pay the difference in price over the life of the contract between Plaintiffs and Defendants.

12) The Defendants are sophisticated, knowledgeable companies that knew what they were doing when they manipulated and/or caused the railcar shortages.

13) The conduct of Defendants, assuring Plaintiffs that they would do everything possible to supply the requisite coal, persisted for over two years leaving Plaintiffs in an unfortunate position.

14) Defendants attempts' to conceal their fraudulent conduct continued for that period.

15) In their attempts to conceal, Defendants blamed CSX Transportation, their railcar carrier.

16) Because of Defendants' conduct, the length of time that Plaintiffs continued to suffer damages lengthened and the amount of their damages increased.

17) Because Defendants didn't disclose that they had other international customers paying substantially higher prices for their coal, Plaintiffs remained in the contract. [9] Subsequently, Plaintiffs were under pressure to remain in the contract resulting in harm to Plaintiffs.

18) The punitive damage award in this case bears a reasonable relationship to the harm caused by Defendants' conduct as well as to the compensatory damages awarded, considering that the combined punitive damages are less than the compensatory damage award.

19) Defendants' conduct is also found to be reprehensible.

20) Defendants alleged that a nonexistent railcar shortage was the reason that they could not

supply Plaintiffs with the coal they were contracted to sell.

21) Defendants did everything they could to encourage Plaintiffs to remain in the contract in order to sell enough coal to Plaintiffs to discourage an action for breach which would have cost Defendants substantially more over the life of the contract.

22) These actions by Defendants went on in excess of two years.

23) The award in this case will not bankrupt Defendants.

24) The Court was only made aware of one other lawsuit filed based on similar acquisitions against Defendant, Massey Energy Company.

25) The Court is of the opinion that it should not reduce the amount of damages based on potential awards or claims in other cases.

26) It will be for any future Courts deciding similar claims to consider this action.

27) Based on the massive amount of discovery and the length of the trial in this matter, the costs expended by Plaintiffs in prosecuting this action must have been substantial.

28) Even with the punitive damage award, Plaintiffs may never be made whole.

29) Just because the amount of damages were the same for both the breach of contract claim and the tort claim, this Court cannot find that the jury was awarding damages for breach of contract only. [10]

30) In their verdict form, the jury clearly indicated that they found both Defendants to be guilty of fraud.

31) The Court is of the opinion that the jury did, in fact, award punitive damages as damages based on the fraud.

32) The Court is of the belief that the amount of damages in this case would be equal or close to the amount of profit Defendants derived from their fraud; however, after considering all of the other factors to be considered by the Court, the Court is of the opinion that the findings with regard to the other factors strongly support the verdict in this case.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for the Court to Affirm the Jury's Award of Punitive Damages is GRANTED.

Jury Verdict

The trial of this matter commenced on the 30th day of May 2007 and concluded on the 2nd day of July 2007 upon the return of a unanimous jury verdict. Based upon such verdict and the rulings made herein:

It is hereby ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiffs, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, against Defendant, Central West Virginia Energy Company, in the amount of One Hundred Nineteen Million Eight Hundred Fifty Thousand Dollars ($119,850,000) plus prejudgment interest in the amount of Twenty-Four Million Fifty-Three Thousand, Six Hundred Sixty-Nine Dollars

($24,053,669). Defendant, Massey Energy Company, is jointly and severally liable for the judgment entered in favor of Plaintiff, Wheeling Pittsburgh Steel Corporation.

It is further ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiff, Wheeling Pittsburgh Steel Corporation, against Defendant, Central West Virginia Energy Company, in the amount of Fifty Million Dollars ($50,000,000).

[11] It is further ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiff, Wheeling Pittsburgh Steel Corporation, against Defendant, Massey Energy Company, in the amount of Fifty Million Dollars ($50,000,000).

It is further ORDERED, ADJUDGED, and DECREED that Defendant, Central West Virginia Energy Company, is entitled to a set-off of the judgment against it in favor of Plaintiff, Mountain State Carbon, LLC, in the amount of $4,237,269.84 plus pre-judgment interest in the amount of $262,570.74.

The Clerk of the Circuit Court shall forward attested copies to all counsel of record.

ENTERED this 2nd day of August 2007.

/s/ Martin J. Gaughan
MARTIN J. GAUGHAN, CHIEF JUDGE
First Judicial Circuit

APPENDIX B
[Order of the Circuit Court of Brooke County, West Virginia (Aug. 31, 2007)]

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC,

Plaintiffs,

v.

CENTRAL WEST VIRGINIA ENERGY COMPANY and MASSEY ENERGY COMPANY,

Defendants.

Civil Action No: 05-C-85

ORDER

Currently before the Court are Defendants' Joint Motions and Memorandums of Law for: Judgment as a Matter of Law or, in the alternative, a New Trial with regard to the Tort Claims and Punitive Damages Award; a New Trial based upon Improper Admission of 404(b) Evidence; based upon Bias and Prejudice of the Jury; a New Trial based upon Admission of Purported Expert Testimony of Alan Stagg.

This Court has reviewed the Defendants' Motions, the Memorandums of Law in Support, considered all papers of record, and reviewed all pertinent legal authorities. After careful consideration of Defendants' Motions for a New

Trial, this Court is of the opinion that these matters were previously considered by the court.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for Judgment as a Matter of Law or, in the alternative, for a New Trial with regard to the Tort Claims and Punitive Damages Award is **DENIED** without hearing.

[2] **WHEREFORE**, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Improper Admission of 404(b) Evidence is **DENIED** without hearing.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Bias and Prejudice of the Jury is **DENIED** without hearing.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Admission of Purported Expert Testimony of Alan Stagg is **DENIED** without hearing.

The Clerk of the Circuit Court shall forward attested copies of this Order to all counsel of record.

ENTERED this 31st day of August 2007.

/s/ Martin J. Gaughan
MARTIN J. GAUGHAN, CHIEF JUDGE
First Judicial Circuit

APPENDIX C
[Order of the Supreme Court of Appeals of West Virginia (May 22, 2008)]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2008, the following order was made and entered:

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC, PLAINTIFFS BELOW,

Respondents

vs.)

CENTRAL WEST VIRGINIA ENERGY COMPANY and MASSEY ENERGY COMPANY, DEFENDANTS BELOW,

Petitioners

No. 080182

On a former day, to-wit, March 12, 2008, came the petitioner, Massey Energy Company, by W. Henry Jernigan, Jr., Timbera C. Wilcox, Ramonda C. Lyons and Nicholas S. Johnson, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Brooke County, rendered on the 4th day of September, 2007, with the record accompanying the petition. Thereafter, on the 11th day of April, 2008, came the respondents, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, by David B. Cross and David F. Cross; and David B. Fawcett and Gregory J. Krock, Buchanan Ingersoll &

Rooney, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Chief Justice Maynard disqualified. Senior Status Judge Jolliffe sitting by temporary assignment.

APPENDIX D
[Excerpts from Defendants' Joint Motion and Memorandum for Post-Trial Review of Punitive Damages Award (July 31, 2007)]

IN THE CIRCUIT COURT OF
BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL
CORPORATION and MOUNTAIN STATE
CARBON, LLC,

Plaintiffs,

v.

CENTRAL WEST VIRGINIA ENERGY COMPANY
and MASSEY ENERGY COMPANY

Defendants.

Civil Action No. 05-C-85-MJG

DEFENDANTS' JOINT MOTION AND MEMORANDUM FOR POST-TRIAL REVIEW OF PUNITIVE DAMAGES AWARD

* * *

[16]

V. THE JURY'S AWARD OF PUNITIVE DAMAGES IS IMPROPER BECAUSE THE DEFENDANTS' CONDUCT LACKS THE REQUISITE REPREHENSIBILITY TO JUSTIFY SUCH AN AWARD AND ANY PROFIT RESULTING FROM DEFENDANTS' ALLEGED CONDUCT IS DISGORGED BY THE COMPENSATORY DAMAGE AWARD

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996), the Supreme Court held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the *conduct* that will subject him to punishment, but also of the *severity* of the penalty that a State may impose."[23] As such, the Court developed three guideposts which serve to guide lower courts in their determination of whether a punitive damages judgment is excessive and thus unconstitutional. The guideposts are: (1) the degree of *reprehensibility* of defendant's conduct, (2) the *ratio* between the actual or potential harm, *i.e.* the compensatory damage award, and the punitive damage award, and (3) the *disparity* between the punitive award and the sanctions available for

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[23] *Williams*, 127 S.Ct. at 1062; *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. at 416, 418, 123 S.Ct at 1513. Most recently, the *Williams* Court discussed the significance of fair notice in this context, and Justice Breyer noted that a state must insist upon certain standards that will "cabin the jury's discretionary authority;" otherwise, a defendant will be deprived of the fair notice that all citizens enjoy. 127 S.Ct. at 1062.

comparable conduct.[24] Indeed, upon consideration of these three guideposts, the Court found that the punitive damages award in *Gore* was excessive.

A. THE DEFENDANTS' ALLEGED CONDUCT LACKS THE REQUISITE REPREHENSIBILITY TO JUSTIFY SUCH AN AWARD

[17] With regard to the first prong, which the Court has consistently deemed to be "the *most important* indicium of the reasonableness of a punitive damages award,"[25] the *Gore* Court advised states to consider the following in determining the reprehensibility of Defendant's conduct: (1) whether the harm caused was physical as opposed to economic; (2) whether the *tortious* conduct evinced an indifference to or a reckless disregard of the health and safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, rather than an accidental result.[26]

In reaching its decision that the punitive damages award was excessive, the *Gore* Court found none of the aggravating factors associated with reprehensible conduct to be present, for the harm which BMW inflicted on the Plaintiff was purely economic in nature. Additionally, the refinishing of the car, prior to purchase, did not effect its

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[24] *Id.* at 575 (emphasis added).

[25] *Id.* (emphasis added).

[26] *Id* at 575-76.

performance or its safety features. [27] In the instant case, similarly, Plaintiffs allege no physical harm, but rather focus solely upon the economic impact of Defendants' conduct. Additionally, as in *Gore*, the Plaintiffs failed to prove that Defendants' conduct evinced an indifference to or a reckless disregard toward others. As such, there is no evidence suggesting that the defendant's conduct jeopardized the health and safety of the plaintiffs.

Of particular interest in the instant case, the Court expounded upon the notion of economic harm and the financial vulnerability prong, explaining that "some wrongs are more blameworthy than others."[28] Revealingly, the Court stated that although certain instances of [18] economic harm may be more reprehensible than others, *e.g.* if the target is in financial distress or is an individual, then a greater penalty may be awarded, those facts evidencing a particularly vulnerable plaintiff compared to the stronger financial standing of the defendant, does not necessitate a mandatory sanction in the form of punitive damages for said harm.[29] In the instant case, as in *Gore*, the fact that Plaintiff Wheeling Pitt's financial standing was allegedly unstable does not automatically result in defendants' conduct being so reprehensible as to validate such an excessive award.

Moreover, in *Campbell*, the Court expressed its well-founded concern over the ramifications likely to result if the plaintiff is permitted to present evidence

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[27] *Id.* at 576.

[28] *Id.* at 575. *Campbell*, 538 U.S. at 419, 123 S.Ct. at 1521.

[29] *Id.*

of a defendant's net worth.[30] Although punitive damages awards traditionally function to deter and punish, much like other, similar criminal sanctions, a given defendant is exposed to such financial punishment in a civil case without those protections which would automatically be guaranteed in a criminal proceeding. In point of fact, the Court raised the concern over granting juries such wide discretion in choosing dollar amounts for a punitive damages award and also allowing the plaintiff to present evidence of the defendant's net worth.[31] This wide discretion coupled with evidence of a wealthy defendant creates a dangerous environment which exposes large businesses to great risk.[32]

[19] In addition to calling attention to defendant's financial status, the *Campbell* Court also commented on juries rendering excessive punitive damage awards based upon the reputation of the defendant.[33] Specifically, the Court opined that a punitive damage award should punish the defendant for the harm caused to the plaintiff by its conduct,

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[30] *Campbell*, 538 U.S. at 417, 123 S.Ct. at 1520.

[31] *Id.*

[32] *Id.* Justice O'Connor clearly expressed her concern over excessive punitive damages awards. In her dissenting opinion, she stated:

> Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category.

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19, 111 S.Ct. 1032 (1991).

[33] *Campbell*, 538 U.S. at 423, 123 S.Ct. at 1523.

not the jury's judgment as to the defendant's character or business practices.[34] Throughout the trial, and nowhere more blatantly than in its closing, the plaintiffs placed undue emphasis on the financial standing of the defendant, and unabashedly compared the defendant's standing with the vulnerability of the plaintiffs financial standing.

- "And you know that Massey had the benefit of keeping its met mines running coal to supply Wheeling-Pitt over the years, and that Massey received not millions of dollars, or tens of millions of dollars from Wheeling-Pitt over the life of the contract. Remember, about 40 million dollars a year. And you know that this contract was so important to Wheeling-Pitt it was one of only two contracts it kept after it went into bankruptcy, and that Wheeling-Pitt agreed to pay CWVEC 100 percent – I'm sorry, 100 cents on the dollar. You know that Massey

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[34] *Id.* Additionally, the *Gore* Court went to great lengths to warn future litigants of the dangers associated with using defendant's status as "big business" to secure a larger damage award:

> The fact that BMW is a large corporation rather than an impecunious individual *does not diminish* its *entitlement* to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy *implicates the federal interest* in preventing individual States from imposing *undue burdens on interstate commerce*. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

517 U.S. at 585, 116 S.Ct. at 1604 (emphasis added).

knew that Wheeling-Pitt was totally – totally reliant on it for its coal, and that shorting Wheeling-Pitt could kill it, the whole company, and extinguish the flame." Trial Tr. Vol. 22, p.5406-5407.

- "Wheeling Pitt is about one of 40 companies that had – steel companies that had to file bankruptcy in recent years, and Wheeling-Pitt was one of two companies to emerge from bankruptcy." Trial Tr. Vol. 22, p. 5453.
- [20] "And when you deliberate on that, think not just about Massey's revenues how they grew and don't just think about how Massey enormously increased its profit margins by selling coal on the export market, and don't just think about how callously Massey treated Wheeling-Pitt, but think about this: Think about what it would take to deter Don Blankenship, a man who does a cost benefit decision on every major decision he makes in his life in running Massey. What would it take to make him to take care to treat customers with special care and not be tempted to cheat in the future. If you enter a judgment that's less than what Massey gained by its conduct, what do you think the cost-benefit analysis will show? Was is worth it to cheat? Now, punitives should not be awarded in every case. But here we have special circumstances. Massey knew that Wheeling-Pitt was in a precarious financial condition, having just emerged from bankruptcy. If Wheeling-Pitt hadn't taken action, we wouldn't be here today, there wouldn't be any coke plant at Follansbee.

> Massey knew it was not supplying anywhere close to Wheeling-Pitt's requirements, but Massey made a conscious decision, and not telling Wheeling-Pitt about it, to sell and ship all the met coal it could to foreign steel companies. This was a conscious decision to put an entire community, an entire company, who was dependent on that company, in jeopardy, . . ." Trial Tr. Vol. 22, p. 5467-5468.

Thus, the jury considered these highly inflammatory assertions and incorporated them into its calculation, resulting in an unreasonable and excessive punitive damage award.[35]

Plaintiffs also alleged that defendants' conduct was particularly reprehensible because of repeated nondisclosures as to the particular uses of the metallurgic coal, which was not transported to Plaintiffs. The Court in *Gore* found the plaintiff's similar reasoning in that case with regard to BMW's nondisclosure of its pre-sale, refinishing policy, to be unpersuasive.[36] Here, as in *Gore*, defendants owed plaintiffs no duty to disclose, and therefore, its failure to disclose, when defendants had no such

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[35] The *Williams* Court emphasized, *inter alia*, the importance of states taking measures to ensure that juries are not basing their punitive damage awards on passion or prejudice or harm to non-parties, but rather that they are asking the "right questions" in assessing the award amount. This notion of ensuring a jury's appropriate motives in awarding damages represents an addition to the traditional *Gore/Campbell* analysis. From this recent decision, the *Williams* Court suggests that the purpose of the award, *i.e.* the jury's basis for determining a particular dollar amount should be considered in evaluating the award's excessiveness. 127 S.Ct. at 1064.

[36] *Id.* at 576-77.

duty or believed in good faith that no duty to disclose [21] existed, is not an affirmative act of misconduct.[37] As such, the repeated omissions of the information are clearly less reprehensible than a deliberate and affirmative act.[38]

The fifth and final factor to be considered under the reprehensibility analysis is not an issue in this case. Plaintiffs failed to present evidence to suggest that defendants had acted with intentional malice, deceit, or trickery. Because defendants had the good faith belief that no duty of disclosure was owed to plaintiffs, then its failure to disclose cannot not now be argued as a deceitful or malicious act; there is simply no proof to make this assertion.

In *Campbell*, the Court plainly stated that "the existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders *any* award suspect."[39] Because the instant case presents none of the factors which are typically understood under the *Gore*, *Campbell*, and *Williams* framework to be egregious and improper conduct, plaintiffs fail to assert sufficiently reprehensible evidence to justify punitive damages of $100,000,000.00.

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[37] *Id.* at 580.

[38] *Id.*

[39] *Campbell*, 538 U.S. at 419, 123 S.Ct. at 1521 (emphasis added).

B. ANY PROFIT RESULTING FROM DEFENDANTS' ALLEGED CONDUCT IS DISGORGED BY THE COMPENSATORY DAMAGE AWARD

In *Campbell*, 538 U.S. 408, 123 S.Ct 1513 (2003), the United States Supreme Court held:

> It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

[22] *Id.*, 538 U.S. at 419, 123 S.Ct. at 1518. The West Virginia Supreme Court of Appeals has long recognized this constitutional limitation on punitive damages. Justice Benjamin, in a concurring opinion in *In re Tobacco Litigation*, 218 W.Va. 301, 624 S.E.2d 738 (2005), recognized that

> [T]his Court has said on many occasions that *[p]unitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant*; and, in a case where such compensatory damages are not adequate for the purpose of punishment, only such additional amount should be awarded as, taken together with the compensatory damages, will sufficiently punish the defendant.

Id. 218 W.Va. at 314, 624 S.E. 2d at 751 (Benjamin, J., concurring) (emphasis added) (citing Syl. *Hess v. Marinari*, 81 W.Va. 500, 94 S.E. 968 (1918). *Accord*, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58, 63 (1895),

Fisher v. Fisher, 89 W.Va. 199, 108 S.E. 872, 874 (1921); and *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393, 399 (1947).

In *Garnes*, the West Virginia Supreme Court of Appeals held that punishment and deterrence are accomplished when "punitive damages [ ] remove the profit and [are] in excess of the profit, so that the award discourages future bad acts by the defendant." *Id.*, 413 S.E.2d at 908-09. Therefore, if the compensatory damage award in the present case of $119,850,000.00 is sufficient to remove all profit that Massey and/or CWVEC gained by its alleged fraudulent scheme plus an additional amount to deter future similar conduct, then punitive damages are not appropriate as a matter of law. Syl. *Hess v. Marinari*, 81 W.Va. 500, 94 S.E. 968 (1918). *Accord*, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58, 63 (1895), *Fisher v. Fisher*, 89 W.Va. 199, 108 S.E. 872, 874 (1921); and *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393, 399 (1947).

Accordingly, defendants, post-trial and for the purposes of this Motion and Hearing, have undertaken an analysis of any alleged profit that they earned as a result of the alleged fraudulent scheme. *See* Exhibit A, Affidavit of James Sutphin. Defendants calculated the additional revenue allegedly generated by selling the amount of coal that Wheeling Pitt deemed it was [23] shorted over the years 2003 – 2006. *Id.* The most cogent comparison is "Version 1," where defendants calculated sales of coal from Wheeling Pitt's approved mine load outs (*i.e.* Bandmill, Goals, Liberty, etc.) at the highest available price that Massey received from its foreign customers. *Id.* According to that calculation, Massey earned a

maximum additional revenue of $42,193,395. *Id.* at ¶ 6(a).

Even if one moves to a less relevant comparison, such as "Version 3," where sales to any metallurgical customer (including those being shipped coal that did not meet the CSA's quality specifications), Massey earned a maximum additional revenue of $52,251,453. *Id.* at ¶ 6(c). Plaintiffs have been awarded $119,850,000.00 in compensatory damages and are likely to be awarded an additional $23,500,000 in pre-judgment interest, bringing the total compensatory award in this case to approximately $143,350,000. Clearly, then, the compensatory award wipes out any alleged "profit" that Massey achieved through its purported "overarching fraud."

Moreover, the compensatory award punishes Massey above and beyond any profit it made by approximately $91,098,547 to $101,156,605. Undoubtedly, the compensatory award sufficiently punishes Massey's conduct and deters future similar conduct. In light of the longstanding precedent in West Virginia that "[p]unitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant," the punitive damages award in this case should be stricken as a matter of law. *In re Tobacco Litigation*, 218 W.Va. at 314, 624 S.E. 2d at 751 (Benjamin, J., concurring) (emphasis added) (citing Syl. *Hess v. Marinari*, 81 W.Va. 500, 94 S.E. 968 (1918), *Accord*, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58, 63 (1895), *Fisher v. Fisher*, 89 W.Va. 199, 108 S.E. 872, 874 (1921); and *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393, 399 (1947). [24]

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VII. OTHER CIVIL ACTIONS AGAINST DEFENDANTS BASED UPON THE SIMILAR ALLEGATIONS MITIGATE AGAINST THE JURY'S AWARD OF PUNITIVE DAMAGES

On July 12, 2007, a Writ of Summons was served upon Massey Metallurgical Coal by Shenango Inc. ("Shenango"). *See* Exhibit B. As the Court will recall Charlie Gress of Shenango testified in this matter as a witness for plaintiffs. Surely, Art Hartline will testify in Shenango's trial against the Defendants. In light of the excessive punitive damage award, it is not surprising that Shenango has now jumped on the bandwagon. Indeed, every customer of Massey who believes it was "shorted" during this period may follow Shenango's lead. As set forth in the Affidavit of Eric Tolbert, Vice President and Chief Financial Officer for Massey, the jury award, without interest or costs, represents nearly twice (170%) Massey's total cumulative net income for the past four years (2003-2006) and fifty (50%) percent of its liquid assets. The punitive damage award alone represents 77% of the four year adjusted income and 23% of the company's liquid assets. If each successive plaintiff secures a similar compensatory and punitive award, Massey and its affiliates will be not only be destroyed for the occurrence of events beyond its [26] control -- they will be financially destroyed. Punitive damages may punish. They may not destroy. *Gore* and *Campbell*, (supra.)

VIII. CONCLUSION

For the reasons set forth above, Defendants respectfully submit that the jury's award of punitive damages be stricken.

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